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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 444

MRS. ROBERT LEE MOORE, ET AL,

Appellants

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,

Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

THE OPINION OF THE COURT BELOW

The decision from which this appeal is taken was rendered by a three-judge court in the United States District Court for the Western District of North Carolina. The Opinion delivered by that Court is reported at 312 F. Supp. 503 (1970), and is also reproduced in

the printed Appendix which has been filed with the Court in this case (44[1]).

THE JURISDICTION OF THIS COURT

This suit originated in the North Carolina State Courts. Because the case involved claim of rights arising under the Constitution of the United States, it was removed into the United States District Court for the Western District of North Carolina. There, by reason of the applicability of 28 USC §2281, it was heard by a three-judge court.

A North Carolina statute is involved in the case, and the essential question before the three-judge court was whether this statute, and a State Court injunction of substantially the same terms as the statute, are in harmony, or in conflict, with the United States Constitution. The three-judge court in its "Final Judgment", ruled that central provisions of the statute, which were also the essential terms of the injunction, are contrary to the United States Constitution, and the Court enjoined "all parties" from "enforcing or seeking" their "enforcement" (63).

The Judgment of the three-judge court was entered on June 22, 1970. On June 23, 1970, the plaintiffs filed Notice of Appeal to this Court (66).

Jurisdiction of this appeal is conferred on this Court by the provisions of 28 USC §1253.

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[1]All references having no other designation than page numbers, are references to the Printed Appendix filed with this Court in this case.

QUESTIONS PRESENTED FOR REVIEW

Was not the injunctive order, which was granted to the plaintiffs in this case, in keeping with the pertinent provisions of the United States Constitution, as expounded by this Court in *Brown vs. Board of Education*?

Upon the facts and circumstances shown by the record in this case, were not the plaintiffs entitled to such injunctive order and should it not now be restored to them?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Provisions of the United States Constitution:

"No person shall be . . . deprived of life, liberty or property, without due process of law".

Amendment V to the Constitution of the United States

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Section 1, Amendment XIV to the Constitution of the United States

Statute of the State of North Carolina:

"*Assignment of pupils based on race, creed, color or national origin prohibited.* — No person shall be refused admission into or be excluded from any

public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

"Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

"The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded

conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

"The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit".

General Statutes of North Carolina, §115-176.1, Vol 3A, p. 173

STATEMENT OF THE CASE

The appellants, who include white and Negro citizens, residents, parents, children and taxpayers of the City of Charlotte and County of Mecklenburg, North Carolina, instituted this suit, on February 22, 1970, in the Superior Court of Mecklenburg County, North Carolina (3).

They alleged that the defendant Board of Education under orders from the United States District Court for the Western District of North Carolina, was about to put into operation a program, the purpose and plan and design of which was to exclude from public schools and assign to public schools thousands of Charlotte-Mecklenburg children, including the

minor plaintiffs, solely according to race and color (9-10, 13-15). The plaintiffs further alleged that they fairly represented, as a class, the other Charlotte-Mecklenburg school children who were, in respect to school attendance, in similar situation with the minor plaintiffs (5-6).

The plaintiffs asserted that in thus designating, according to race and color, the public schools which Charlotte-Mecklenburg children must attend, the defendant Board of Education, under the orders of the United States District Court, was violating rights guaranteed to these children, including the minor plaintiffs, by the Constitution of the United States, and that the Supreme Court of the United States had so ruled in the landmark case of *Brown vs. Board of Education*[1] (10-12).

In their Complaint, the plaintiffs further pointed to the North Carolina statute, quoted above[2], which is, they contend, not only in harmony with the *Brown* decision, but is, in its central provisions, essentially a statutory enunciation of the ruling of that case (11-12).

The plaintiffs therefore asked the State Court, upon the basis of the United States Constitution as construed in *Brown* and the North Carolina statute in

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[1]*Brown vs. Board of Education*, 347 US 483, 74 S Ct 686, 98 L Ed 873 and 349 US 294, 75 S Ct 753, 99 L Ed 1083.

[2]General Statutes of North Carolina, Section 115-176.1, Vol 3A, p. 173.

harmony therewith, to grant an injunction against the wrongful and unlawful compulsions which the defendant Board of Education, by orders of the United States District Court, was about to impose upon them (17-18).

The State Court was of the opinion that the plaintiffs showed valid ground for such an injunction and issued an Order as follows:

> "That the defendants are hereby enjoined and restrained from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which any children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed Charlotte-Mecklenburg public school because of their race or color" (19-20).

The defendants moved the case into the United States District Court for the Western District of North Carolina upon the ground that the plaintiffs were asserting rights involving and drawing into issue provisions of the United States Constitution and that the case, under 28 USC §1441, was one over which the Federal Courts properly had jurisdiction (21).

The defendants further moved, under 28 USC §2281, for the convening of a three-judge court to pass upon the constitutionality of the aforesaid State statute and, consequently, the validity or invalidity

of the aforesaid State Court injunction. A three-judge court, constituted as required by 28 USC §2284, was thereupon convened (39).

Before the three-judge court conducted its hearing, however, a single Judge of the United States District Court for the Western District of North Carolina, "suspended and held in abeyance and of no force and effect" the aforesaid State Court injunction "pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court" (32-33).

Prior to the hearing before the three-judge court, the defendants filed Answer to the plaintiffs' Complaint, and factual issues were further resolved through discovery proceedings in the form of Request for Admissions and Answers thereto (40-43).

Hearing before the three-judge court was held on March 24, 1970. On the same day, the Court heard the related case of *Swann, et al vs. Charlotte-Mecklenburg Board of Education, et al.* The *Swann* case is now before this Court—both on direct appeal from the decision of the three-judge court and on grant of Writ of Certiorari as to other aspects of that case which have been heard in the United States Court of Appeals for the Fourth Circuit.

On April 29, 1970, the three-judge court rendered its decision. The Court struck down central provisions of the State statute, which were also the essence of the State Court injunction. The statute provides that "no

student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins". The Court ruled that this provision is unconstitutional, for that, according to the holding of the Court, the Fourteenth Amendment to the United States Constitution itself requires that compulsory assignments of children to public schools may be made according to race and for the very purpose of creating "racial balance". *Swann vs. Charlotte-Mecklenburg Board of Education* and *Moore vs. Charlotte-Mecklenburg Board of Education*, 312 F. Supp. 503, 509-510 (1970).

Thus, the Court, in its "Final Judgment", adjudged the statutory provision forbidding school assignments according to race to be "unconstitutional, void and of no effect", and declared that "all parties are hereby enjoined from enforcing, or seeking" to enforce, this prohibition against compulsory racial assignments.

In short, said the three-judge court, the Constitution commands that children may be compulsorily assigned to public schools according to race or color.

The plaintiffs' contention is that the United States Constitution neither commands nor authorizes such compulsion, based upon race, but that instead, the Constitution, like the North Carolina statute and the State Court injunction, positively forbids such compulsion. The plaintiffs contend that the ruling of the three-judge court is a direct and basic and complete

contradiction of the meaning of the Fourteenth Amendment to the United States Constitution, as established by the decision of this Court in *Brown vs. Board of Education.*

The plaintiffs are appealing to this Court to protect them, and the children of Charlotte-Mecklenburg, from the compulsions based upon race, which the United States District Court has ordered the defendant Board of Education to impose upon them.

SUMMARY OF ARGUMENT

No constitutional principle is more positively and steadily expounded by the decisions of this Court than this — that in this land, Government, whether State or Federal, shall not act upon its citizens according to their race, and that the application of laws shall not be based on race.

Brown vs. Board of Education established this principle in the field of public education, and laid down the mandate that children shall not be excluded from public schools nor assigned to public schools on the basis of race.

The plaintiffs come before this Court, however, asserting that their constitutional rights are being violated in this very respect. They show that the United States District Court below has issued orders and imposed compulsions under which the plaintiffs, and other children in the City of Charlotte and County of Mecklenburg, North Carolina, are being excluded

from public schools, against their will, and assigned to public schools, against their will, solely on the basis of race and color.

The plaintiffs show, further, that by reason of these orders and compulsions, the public school attendance zones or areas in Charlotte-Mecklenburg have been artificially and non-geographically gerrymandered, for the sole purpose of accomplishing racial inclusions and exclusions — and that thousands of Charlotte-Mecklenburg school children, including the minor plaintiffs, are also being assigned to schools distant even from the children's gerrymandered areas — and that such gerrymandering, and such assignments to even more distant schools, are all compulsory arrangements based upon and shaped according to race.

The plaintiffs contend that the orders of the United States District Court are thus requiring that the Charlotte-Mecklenburg public schools be operated on a racial basis rather than on a non-racial basis, as *Brown vs. Board of Education* commands. The plaintiffs raise the plea that each of them has an individual constitutional right to protection against the racial compulsions which are thus being imposed upon them.

Still further, the plaintiffs show that before these orders and compulsions were promulgated, the Charlotte-Mecklenburg school system was, indeed and in truth, being operated on a non-racial basis and in

keeping with the commands of the Constitution and the ruling of *Brown vs. Board of Education*.

The pertinent decisions of this Court are analyzed for the purpose of demonstrating that they do not support the orders and compulsions in question, but instead forbid them. The basic errors in decisions by a three-judge court and the Court of Appeals below are also discussed in detail.

The plaintiffs undertake to show that from every standpoint, they are entitled to protection in the consitutional right which they are invoking — that logic, consistency, the decisions of this Court, and, above all, the Constitution's guarantees of individual liberty, support their plea.

Finally, the plaintiffs urge that since it cannot possibly be claimed that the compulsions here imposed are free from doubt as to their constitutional validity, it would seem appropriate and needful to give thought to some of the practical considerations which bear upon this great controversy.

ARGUMENT

I.

The Constitution of the United States Guarantees to the Plaintiffs Protection Against Governmental Action Based on Race and That Guarantee Is Being Violated

The essence of this controversy may be stated as follows. In the operation of the public schools of this

country, is there to be governmental compulsion based on race — or is there to be freedom without regard to race?

The United States Constitution, of course, controls the answer. Since that great charter has no higher purpose than that of shielding individual liberty from the power of Government, it would seem likely that the answer must be in favor of the latter alternative —freedom without regard to race. In *Brown vs. Board of Education*, this Court ruled that such is indeed the Constitution's answer.

Yet the plaintiffs are now before the Court urgently and earnestly asserting that the first alternative is being imposed upon them — govermental compulsion based on race — despite this Court's ruling in *Brown* — and that the constitutional rights assured to them by the *Brown* decision are being grievously violated.

Even further, the plaintiffs point out, the tragic irony is that this racial compulsion is being fastened upon them in the name of the *Brown* decision itself, and upon the amazing contention that the United States Constitution requires that this compulsion be imposed.

Each of the minor plaintiffs, both black and white is saying:

> "Because of my race, the school authorities are forcibly barring me from the school I wish to attend. Because of my race, the school authorities

forcibly compel me to attend a school I do not wish to attend. The school authorities take note of the color of my skin and shape these compulsions upon me solely according to whether they find me to be black or white.

"They say that the United States District Court tells them that the Constitution of our Nation requires this. I cannot believe that the Constitution requires that freedom shall thus be taken away from me because of the race into which I was born. Rather, it is my understanding, and my earnest faith and belief, that the Constitution forbids such action being taken against me and protects me from it".

It should be noted that only in this case are there plaintiffs thus complaining that their constitutional rights are being violated. In the companion case of *Swann vs. Charlotte-Mecklenburg Board of Education*, the plaintiffs sought and obtained, and are therefore supporting, the orders of which the plaintiffs in the present case complain. The School Board, defendant both there and here, is essentially in a position of seeking this Court's guidance as to what should be its official course of action and, while opposing the District Court's orders in substantial part, does not by any means present the full and basic opposition which the plaintiffs raise in this case. Nor could the Board do so, for the constitutional rights here relied upon are necessarily and in nature individual and

personal and can be asserted only by those to whom the Constitution has assured them.

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights".
>
> *Shelley vs. Kraemer*, 334 US 1, 22, 68 S Ct 836, 92 L Ed 1161, 1185

This is clearly expressed by this Court in *State of Missouri vs. S. W. Canada.* There the Court said that "the constitutional right" cannot be made to " 'depend upon the number of persons who may be discriminated against . . .' " and that " 'the essence of the constitutional right is that it is a personal one' ". Further, the Court declared that " 'it is the individual who is entitled to the equal protection of the laws, and if he is denied' " such protection, " 'he may properly complain that his constitutional privilege has been invaded' ". The Court emphasized that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to" accord him that right "whether or not other Negroes sought the same opportunity". *State of Missouri vs. S. W. Canada*, 305 US 337, 351, 59 S Ct 232, 83 L Ed 208, 214.

A. The Orders Issued By The United States District Court Require That The Charlotte-Mecklenburg Public School System Be Operated On A Racial Basis

In presenting the case for these plaintiffs, it first seems needful to show that the compulsions, to which the plaintiffs say they are being subjected, are indeed as the plaintiffs declare them to be. It would then seem pertinent to show the factual situation in the Charlotte-Mecklenburg school system, where the alleged compulsions are being imposed.

The directives of the United States District Court, against which the plaintiffs raise their plea of constitutional right, have been issued by that Court in a series of decisions and orders. In the first of these, the Court declared that:

> "Since this case was last before this court in 1965, the law (or at least the understanding of the law) has changed" (286a[1]).

The applicable law is, of course, the Fourteenth Amendment to the Constitution and the interpretation of that Amendment as laid down by this Court in *Brown vs. Board of Education.* The Fourteenth Amendment has obviously not changed. This Court has not at any time stated that its interpretation of the Amendment, as declared in *Brown*, has changed.

The command of the Fourteenth Amendment, and of the *Brown* decision, is that public schools in this land shall be operated "on a non-racial basis"[2]. On the

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[1]Page references followed by the letter "a" are references to the printed Appendix on file with this Court in the *Swann* case.

[2]*Brown vs. Board of Education*, 349 US 294, 301, 75 S Ct 753, 99 L Ed 1083, 1106.

other hand, as will be here shown, it is clear beyond argument that the District Court has ordered that the public schools of Charlotte-Mecklenburg shall be operated on a racial basis[1].

Thus, if the District Court orders were to be upheld, it could only be upon the ground that the law — the law laid down in *Brown* — has indeed changed. Yet this Court surely would not have made so crucial a change in that fundamental ruling without saying it was doing so.

The District Court's central directive is:

> "That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students" (822a).

In the "racial composition" of the entire Charlotte-Mecklenburg school system, "about 29% are Negro and about 71% are white" (1301a). This, therefore, is the approximate "proportion of black and white students" that the District Court directs for all schools at all grade levels.

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[1] If it be questioned whether the action here complained of is not Federal rather than State, in that the compulsions originate in the orders of the United States District Court, and that therefore the prohibitions of the Fourteenth Amendment do not apply, the first answer is that it is the defendant School Board which is immediately and directly imposing the compulsions on the plaintiffs. And the conclusive answer to such question, in any event, is that in *Bolling vs. Sharpe*, this Court, on the Fifth Amendment, reached the same conclusion and made the same ruling as in *Brown. Bolling vs. Sharpe*, 347 US 497, 74 S Ct 693, 98 L Ed 884.

It is interesting to note that in its first Opinion and Order, the District Court said that it did not consider that it had "the power to make" such an order (310a). In its second Order, the Court reiterated this, saying more emphatically:

> "The court is not interested in a restatement of the previous demand of plaintiffs that all the schools in the system be populated on a 70/30 basis, because as previously stated the court does not have the power to make such an order . . ." (371a).

Yet the Court later proceeds to do what it had twice declared that it had no power to do.

It is not possible to deny or dispute that the District Court has directed the school authorities to assign children to the Charlotte-Mecklenburg schools on a racial basis. Is it not then equally clear that as to plaintiffs who claim constitutional right against such compulsion imposed according to race, the Fourteenth Amendment and *Brown vs. Board of Education* stand as their protector?

The District Court went on to order:

> "That the defendants maintain a continuing control over the race of children in each school, just as was done for many decades before *Brown vs. Board of Education*, and maintain the racial make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable" (823a).

It is submitted that this is indeed an amazing command that in the schools of this City and County, a regime of racial compulsion shall be revived and continuously maintained by governmental force, "just as was done" before this Court outlawed it in *Brown vs. Board of Education.*

The justification will be offered that this time it is integration that is being forced, whereas before it was segregation that was being forced. Nevertheless, it is still force — force at the hands of Government — and force imposed on each individual according to his race and solely on that basis. The plaintiffs are raising the shield of the Constitution against governmental imposition of such force upon them — exactly as did the plaintiffs in *Brown.*

The District Court has further ordered that certain detailed plans or programs be put into effect, by way of implementation of its basic directives (825a, 827a). Under these plans, the boundaries of most of the attendance zones or areas in the Charlotte-Mecklenburg school system have been redrawn in a manner constituting obvious, and often grotesque, gerrymandering — the sole purpose being, as hereinafter shown, to accomplish racial inclusions or exclusions. The United States Court of Appeals for the Fourth Circuit characterizes these attendance areas as being now "drastically gerrymandered" to "promote" racial

mixing[1]. Numerous Charlotte-Mecklenburg schools are also "paired" with other schools in the system, for the purpose of compelling children in such schools, to travel outside their own attendance areas, even though such areas may already have been gerrymandered.

Much of this gerrymandering of attendance areas, and "pairing" to force attendance even beyond gerrymandered areas, is shown in map exhibits which were received in evidence at the hearing in this case before the three-judge court. These have been reproduced and are on file with the Court as a supplement to the printed Appendix in this case (Exhibits — Supplement To Appendix).

Through discovery procedure, it stands specifically admitted and established in the record that this redrawing of attendance area boundaries, and also this "pairing" of numerous schools across attendance area boundaries, "is shaped and controlled by racial considerations, that is, by a conscious and purposeful effort to obtain and to require by assignment within

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[1]Mr. Justice Marshall, when arguing before this Court as counsel for the plaintiffs in the *Brown* case, said with respect to such gerrymandering:

> "Then I think whatever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint." (Hon. Thurgood Marshall in oral argument before this Court on behalf of the plaintiffs in the case of *Brown vs. Board of Education*).

such restructured districts" and "by assignment of children outside their districts" as "nearly as possible a racial ratio of 70% white and 30% black children in each school" (40-43).

The record in the *Swann* case, where the compulsions now being imposed on the plaintiffs were shaped, and the various decisions and orders of the District Court, and the opinions of the Court of Appeals in that case, are replete with intricate discussions of "pairing, grouping, clustering and satellite zoning" and "rezoning with or without satellites" — all of these being artificial arrangements for forcing children into schools in order to accomplish an increased mixing of races (1208a, 1211a, 1212a, 1214a, 1276a, 1277a).

These elaborate programs for "transporting white children into and black children out of"[1] schools, and vice versa, have come upon the scene comparatively recently and are subsumed in the current colloquial phrase "forced bussing". Under these arrangements, the child is, of course, not actually required to ride a bus, but he is required to get to the assigned school, in one way or another, and the bus transportation is offered to him.

The most frequent opposition to this comes naturally from the child, and the parents of the child, who has been attending a school in his neighborhood and near to his home, and whose life, and the life of his

[1] 1211a.

family, is geared to those circumstances, and who now is excluded from the school he has been attending and is directed to travel thirty miles or more each day to and from a distant and unfamiliar school.[1]

The wisdom of this, and the benefit or harm it may bring, are matters on which there is deep and vigorous disagreement. But the central thrust of this brief is that on one matter there can be no valid disagreement, namely, that if such a child comes into Court and pleads constitutional right and shows that this is being forced upon him against his will by governmental authorities and that he is being subjected to it because of his race — then those who seek to impose the force upon him must give way and cease doing so. Such is the power of constitutional right — and such is the constitutional right declared in *Brown*.

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[1]It might be noted that the member of the Court of Appeals, who has espoused most strongly the compulsory travel to distant schools required by the District Court, formerly spoke very unfavorably of it:

> "This is far from suggesting that children are to be uprooted arbitrarily and bussed against their will to distant places merely to place them with children of the other race. No such thing has been proposed or contemplated in Richmond or, so far as we know, anywhere in this circuit."
>
> *Bradley vs. School Board of Richmond*, 345 F. 2d 310, 323, 324 (4th Cir., 1965). Sobeloff, Circuit Judge (concurring in part and dissenting in part).
>
> cf. *Swann vs. Charlotte-Mecklenburg Board of Education* (1279a)—(opinions not yet printed in official reports). Sobeloff, Circuit Judge (concurring in part and dissenting in part)

B. Prior To The Orders Issued By The United States District Court The Charlotte-Mecklenburg Public School System Was Being Operated On A Non-Racial Basis

It is deeply ironic that racial compulsions of the most extreme nature have been decreed in a school system where the facts pertaining to racial matters are as the record in this case shows them to be in Charlotte-Mecklenburg.

With 84,500 pupils attending 106 schools, this is the 43rd largest public school system in the Nation (1263a). Before the District Court imposed the compulsions here in question, there were Negro children in attendance at all these schools, except 8 of them, and these 8 schools which did not have Negro attendance, had a total attendance of only 5,514 children as compared to the 84,542 children in the school system (7, 34).

As has been hereinabove noted, white children constitute approximately 70%, and Negro children approximately 30%[1] of all the pupils in the Charlotte-Mecklenburg school system. Prior to the issuance of the District Court's orders, there were thousands of white children and thousands of Negro children attending Charlotte-Mecklenburg schools which had enrollments of white and Negro children in approximately these very proportions (7-8, 34).

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[1]To be precise, 71% and 29%.

A majority of the one hundred largest school systems throughout the Nation, had a lower ratio of white and Negro children attending the same schools then was the case in the Charlotte-Mecklenburg school system (8, 34).

As long ago as 1965, in the same *Swann* case which is now pending, it was judicially determined, both in the District Court and in the Court of Appeals, that the Charlotte-Mecklenburg public school system was being operated in keeping with the requirements of *Brown;* that the School Board had instituted, and both the District Court and the Court of Appeals approved, "a desegregation plan based on geographic zoning", which zoning the District Court and the Court of Appeals found not to have been gerrymandered on any considerations of race — with, additionally, all children having "an unqualified right of transfer to any other school in the system, subject only to space limitations in the school to which transfer [was] sought" (1263a), *Swann vs. Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (1965) and *Swann vs. Charlotte-Mecklenburg Board of Education,* 369 F. 2d 29 (4th Circuit, 1966).

Indeed, the District Court Judge who promulgated the orders now at issue, renewed such findings, as recently as 1969, and expressly stated that in the Charlotte-Mecklenburg school system, each pupil was at liberty "to request assignment to another school", that "no reason for transfer need be given" and that

"all transfer requests [were] honored", unless the school to which transfer was requested was "full" (289a).

Yet, this freedom is now gone, for the present orders expressly specify that "freedom of transfer" shall "not be allowed" to any child unless the transfer has an effect of increasing racial mixing (823a). Freedom to go in only one direction is, of course, not freedom at all, but the abolishment of freedom.

This Court expressly so ruled in endorsing unrestricted school transfer arrangements, such as Charlotte-Mecklenburg had, and in condemning a one-way school transfer arrangement, such as the District Court has now ordered:

> "Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination . . .
>
> . . .
>
> "[I]f the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another".
>
> *Goss vs. Board of Education*, 373 US 683, 687, 83 S Ct 1405, 10 L Ed 2d 632, 635

Still further, in issuing the orders now in question, the District Court found that in the Charlotte-Mecklenburg school system, there was "no racial discrimination" in the expenditure of "money" or the "providing" of "facilities", and no "inequality based upon racial motives" with respect to the "quality" of "teachers" or "books" or "school buildings" or "athletics" or "school fees" or "free lunches" or "elective courses" or the "evaluation of students"; and that the School Board had "achieved a degree and volume" of intermixing of white children and Negro children in the Charlotte-Mecklenburg public schools which "exceeded the performance of any school board whose actions have been reviewed in appellate court decisions" (298a-301a; 311a).

Yet the District Court then proceeded to fasten upon the plaintiffs and thousands of other Charlotte-Mecklenburg school children decrees which are probably not themselves "exceeded" anywhere in their severity and in their direct invasion of individual constitutional rights.

The Charlotte-Mecklenburg school system being as described above, according to the District Court's own findings, what was it that impelled the Court to issue its Draconian edicts? Essentially, said the Court, it was the further fact that in 1969, there were still a few Charlotte-Mecklenburg schools that had members of only one race in them and a number of schools in which the racial mixing did not approximate the 71-29 ratio of the entire school population.

The existence, in the Charlotte-Mecklenburg school system, of this degree of non-mixing, said the Court, was an offense against the Constitution, and the Constitution required, the Court further declared, that the mixing be increased. The directives which the Court then issued, for the purpose of bringing about such increase, have been hereinabove outlined.

C. The Decisions Of This Court Do Not Support Such Orders As The District Court Has Issued

The District Court stated that it had to issue the orders it did because of decisions recently rendered by this Court, such as: — *Green vs. School Board of New Kent County*, 391 US 430, 88 S Ct 1689, 20 L Ed 2d 716; and *Alexander vs. Holmes County Board of Education*, 396 US 19, 90 S Ct 291, 24 L Ed 2d 19; and *Carter vs. West Feliciana Parish School Board*, — US —, 90 S Ct 608, 24 L Ed 2d 477. As the Court pointed out, those cases emphasized that "dual" school systems are not permissible and that it is the duty of the school authorities to operate only "unitary" school systems.

We come then to the question: — Is the Charlotte-Mecklenburg school system "dual" or "unitary"? What do these words mean constitutionally? For the Constitution, of course, controls their meaning.

The District Court, with the acquiescence of the Court of Appeals, held that the Charlotte-Mecklenburg school system is "dual", because, as stated above, in it there are some schools that have members of only

one race in them and a number of schools in which the racial mixing does not approximate the percentage proportions that exist in the school population as a whole.

But that is not by any means what this Court has declared to be the test. In *Alexander vs. Holmes County Board of Education*, this Court defined a "unitary school system" as one "within which no person is to be effectively excluded from any school because of race or color". *Alexander vs. Holmes County Board of Education*, 396, US 19, 90 S Ct 29, 24 L Ed 2d 19. Mr. Justice Black, in other proceedings in the *Alexander* case, stressed that the rights of any pupil "who is effectively excluded from a public school on account of his race or color" must be protected. *Alexander vs. Holmes County Board of Education*, supra.

Chief Justice Burger, concurring in *Northcross vs. Board of Education*, emphasized that this Court has "defined a unitary school system", namely, as one " 'within which no person is to be effectively excluded from any school because of race or color' ". *Northcross vs. Board of Education*, — US —, 90 S Ct —, 25 L Ed 2d 246.

This being, as has been emphatically reiterated, the test — the Charlotte-Mecklenburg school system is "unitary". For years, no person has been excluded—no person claims to have been excluded and nobody claims that anybody has been excluded—from any school in Charlotte-Mecklenburg because of race or

color. *Swann vs. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (1965) and *Swann vs. Charlotte-Mecklenburg Board of Education*, 369 F. 2d 29 (4th Cir., 1966), (1263a), (7-9, 34).

As has been hereinabove noted, it was judicially ascertained five years ago that children were being assigned to the schools in Charlotte-Mecklenburg on the basis of "geographic zoning", which zoning was not gerrymandered on any considerations of race, with all children having an unqualified right of transfer to any other school in the system. *Swann vs. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (1965) and *Swann vs. Charlotte-Mecklenburg Board of Education*, 369 F. 2d 29 (4th Cir., 1966).

It will also be remembered, and deserves repeating, that the District Court, before issuing the orders now in question, renewed these findings and specifically stated that in the Charlotte-Mecklenburg schools each pupil was at liberty "to request assignment to another school", that "no reason for transfer need be given", and that "all transfers [were] honored", unless the school to which transfer was requested was "full" (289a).

How then could the District Court condemn Charlotte-Mecklenburg as a school system in which pupils were being excluded from schools because of their race or color?

It would appear that in its recent school decisions, such as *Green vs. School Board of New Kent County*,

Alexander vs. Holmes County Board of Education and *Carter vs. West Feliciana Parish School Board*, this Court was expressing impatience with school authorities whom it deemed to be taking advantage of the phrase "all deliberate speed" by dragging their feet in granting children access to schools and assigning children to schools, without consideration of race or color —and that this Court was expressing its stern disapproval of situations in which the Court was unconvinced that such access truly had been accorded and such assignments truly had been made—without any regard to race or color. The record here establishes beyond doubt or dispute that Charlotte-Mecklenburg is not such a situation.

Green vs. School Board of New Kent County is the lead case cited by those who contend that this Court now interprets the Constitution as meaning, and *Brown* as likewise meaning that children may be, and indeed must be, excluded from schools and assigned to schools on a racial basis, if necessary to accomplish racial mixing.

Careful reading of *Green vs. School Board of New Kent County* reveals, however, that such was not its ruling. At the very outset of that case, this Court stated that the "question for decision" there was "whether under all the circumstances" of the case, the New Kent County School Board had achieved "a system of determining admission to the public schools on a nonracial basis", as required by *Brown vs. Board of Education. Green vs. School Board of New Kent County,*

391 US 430, 431-432, 88 S Ct 1689, 20 L Ed 2d 716, 720.

The plaintiffs have no quarrel with that statement of the test upon which a public school system is to be judged. The plaintiffs say, however, that "under all the circumstances" here shown as to the Charlotte-Mecklenburg school system, it is clear that prior to the District Court orders "admission to the public schools" of Charlotte-Mecklenburg had for years been "on a non-racial basis" and that this school system was genuinely and in truth operating on such basis.

It would appear that the vital factual difference, between the public school system of New Kent County and the public school system of Charlotte-Mecklenburg, is that in the former, children were all along "each year automatically reassigned"[1] to the same schools which they respectively attended when segregation was governmentally compelled, with a right to ask transfer, whereas in Charlotte-Mecklenburg, as has been hereinabove emphasized, governmentally compelled segregation was years ago supplanted by geographic zoning, non-gerrymandered, with freedom of transfer in addition.

It is submitted that *Green vs. School Board of New Kent County* is "under all" its "circumstances" no authority as to what should be the ruling for Charlotte-Mecklenburg "under all" its "circumstances".

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[1]*Green vs. School Board of New Kent County*, 391 US 430, 433, 88 S Ct 1689, 20 L Ed 2d 716, 721.

Further, however—and irrespective of how the Charlotte-Mecklenburg school system is being operated—each of the plaintiffs is pleading his individual constitutional right here, and is entitled to individual protection in his right, not to be forced into or out of any school because of his race or color.

For example, let us suppose that a school board, presiding over a sizeable school system where there are substantial numbers of white and black pupils, is still unlawfully confining Negro children to a certain school in the system, because of their race. Let us further suppose that John Jones, a Negro child in the fifth grade at this school, lives near to the school and that it is in all respects the school which he would naturally and normally attend.

A number of the Negro children who have been confined, for no reason except race, to this school, go into Court and obtain a court order that they shall no longer be denied, on account of their race, access to any school in the system. Because the fifth grade is all or largely Negro, and solely as a step toward changing the condition of segregation at this school, the court order directs that the entire fifth grade be moved to another school or schools.

John Jones, if he wishes it, is at that point entitled to a court injunction protecting him in his individual constitutional right not to be moved, solely on racial considerations, anywhere.

"The Constitution confers upon no individual the right to demand action by the State which results

in the denial of equal protection of the laws to other individuals":

> *Shelley vs. Kraemer*, 334 US 1, 22, 68 S Ct 836, 92 L Ed 1161, 1185

D. The Basic Errors In The Decisions Of The Three-Judge Court And The Court Of Appeals

The central fallacy of the decision of the three-judge Court is exposed by the Court's opinion itself. In analyzing the North Carolina statute, the Court quotes the provision that "no person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin", and then unhesitatingly rules that:

> "There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown vs. Board of Education of Topeka*, 347 US 483, 74 S Ct 686, 98 L Ed 873 (1954)".
>
> *Swann vs. Charlotte-Mecklenburg Board of Education and Moore vs. Charlotte-Mecklenburg Board of Education*, 312 F. Supp. 503, 508 (1970)

The Court turns, however, to the provision that "no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins", and declares it to be "unconstitutional" because, says the Court, it is contrary to the Fourteenth Amendment to:

"[P]rohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially 'balance' the school system".

Swann vs. Charlotte-Mecklenburg Board of Education and Moore vs. Charlotte-Mecklenburg Board of Education, 312 F. Supp. 503, 509 (1970)

Here is a basic and inescapable inconsistency. The Court says it is not constitutionally permissible to exclude a child from a public school on the basis of race, and therefore North Carolina may have a statute outlawing any such practice of racial exclusion. Then the Court faces about and says it is constitutionally permissible to assign a child to a public school and compel him to attend that school on the basis of race, and therefore North Carolina may not have a statute outlawing any such practice of racial assignment.

These are contrary rulings on the same thing. Exclusion from school on the basis of race and assignment to school on the basis of race are the two sides of one coin.

By way of illustration: — A child wants to go to school "A" and does not want to go to school "B". The school authorities, however—on the basis of race—have assigned him to "B". They say to him "we cannot, on the basis of race, exclude you from 'A', but we can, on the basis of race, assign you to 'B', and that we have done, and there you must go". Is it not obvious

that on the basis of race, they have excluded him from "A"?

The Court unhesitatingly and positively holds that the child cannot be racially excluded from "A". Yet the Court immediately allows him to be racially excluded from "A" by ruling that he can be racially assigned to "B".

The Court cannot be right in both of these positions. One or the other must yield. The Court says that its position forbidding racial exclusion cannot yield, since "it is merely a restatement of the principle announced in *Brown vs. Board of Education of Topeka*". The Court is exactly correct in this. Therefore the Court's position permitting racial assignment is the position which must yield.

In order to become consistent, the Court's position on racial assignment must be reversed, so that racial assignment is forbidden. Thereupon it becomes consistent with the Court's position on racial exclusion. Thus, like the Court's position on racial exclusion, the Court's position on racial assignment will have become consistent with *Brown* and "merely a restatement of the principle announced in *Brown*[1].

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[1]The Court also struck down the sentence in the statute which prohibits "involuntary bussing in contravention of this article". "Involuntary bussing" is, however, as has been noted above, a colloquialism for the legally exact language of the preceding sentence, that is, "assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins". These two sentences, as the Court recognized, stand or fall together."

Since the provisions in the statute against racial assignment are the only provisions which the Court struck down, and since we have seen that the outlawing of racial assignment, like the outlawing of racial exclusion, "is merely a restatement of the principle announced in *Brown*", it follows that the statute must stand.

It also follows that the Court injunction granted to the plaintiffs stands — for it is merely a restatement of the central provisions of the statute against racial exclusion and racial assignment — and it is, therefore, like the statute, "merely a restatement of the principle announced in *Brown*".

The paradox here discussed, in the decision of the three-judge court below, brightly illuminates the abyss of confusion and inconsistency into which many of the Federal Courts have fallen, as they have struggled with this public school controversy during the last two to three years. In undertaking to move forward with what they have deemed to be the implementing of *Brown* — that is, by commanding that various school systems now proceed to operate on a racial basis —they have fundamentally repudiated *Brown* — and all of this Court's other decisions outlawing governmental action on the basis of race — apparently without discerning that this is in truth the meaning of their rulings.

In its decision, the three-judge court foreshadowed, and the Court of Appeals in the *Swann* case more fully explicated, a further fundamental error.

The three-judge court expressed the view that the Constitution requires that "any reasonable method" may be used to compel a sufficient "racial 'balance' " in the public schools. *Swann vs. Charlotte-Mecklenburg Board of Education* and *Moore vs. Charlotte-Mecklenburg Board of Education*, 312 F. Supp. 503, 510 (1970).

The Court of Appeals said that "school boards must use all reasonable means" to accomplish such end and that it was adopting "the test of reasonableness" (1267a). The Court of Appeals approved the gerrymandering of the Charlotte-Mecklenburg attendance zones or areas, which, as noted above, it refered to as "drastically gerrymandering" in order "to promote" racial mixing in the schools (1265a). It approved, for Charlotte-Mecklenburg junior and senior high schools, the "pairing" and "clustering" of schools for the purpose of compulsorily assigning children to schools distant even from their own zones after gerrymandering, but ruled that such arrangements as ordered by the District Court for the elementary schools were too "exclusive" and therefore disapproved such arrangements as to the elementary schools (1276a, 1277a[1]).

[1]The Court says that "the pairing and clustering of schools", and, as the Court would seem to imply, the consequent bussing back and forth between them, "has been approved", and the Court cites in support of this "*Green vs. School Board of New Kent County*, 391 US 430, 442, n. 6 (1968)". This would seem to be in error. The footnote in *Green*, referred to by the Court, does indeed mention "bussing", but does not mention "the pairing and clustering of schools". However, "bussing", as has been noted, is the popular

It is submitted that such a rule of "reasonableness" would necessarily mean unending litigation in this field — for the Courts would have to rule, with respect to each administrative decision and action, as to whether they, the courts, deem it to be "reasonable" or not.

In a far more fundamental respect, however, this approach is grievously wrong. We deal here with constitutional rights. They may not be granted or withheld by a court as the court may consider reasonable or wise or desirable. They do not rest in equitable discretion.

The Constitution guarantees the plaintiffs, as this Court has declared, freedom from any governmental compulsion imposed on the basis of race — and that does not mean that a court can deprive the plaintiffs of that freedom whenever and to whatever "degree" the court may deem suitable and "reasonable". If this were so, the Bill of Rights and the Fourteenth Amendment would not be in truth a guarantee of anything.

> "The Consitution was intended — its very purpose was — to prevent experimentation with the fundamental rights of the individual".
>
> *Truax vs. Corrigan*, 257 US 312, 338, 42 S Ct 124, 66 L Ed 254, 265

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shorthand term for assigning children to distant schools, and it is of course true that paired or clustered schools are the schools between which such "bussing" does principally take place. The *Green* note is, however, a quotation from a Court of Appeals decision, and that decision instead of approving the "bussing", disapproved it.

E. All Factors Support The Plaintiffs' Contention That Their Constitutional Rights Are Being Invaded

It is argued that since all white children and all Negro children in Charlotte-Mecklenburg were prior to *Brown* required by law to attend separate schools, today's lack of complete mixing is the result of that old law and since that law was unconstitutional, its residual effect upon present day school children is a present violation of their constitutional rights.

Both the District Court and the Court of Appeals refer to other governmental actions, such as "local zoning ordinances" and "urban renewal programs" as tending to cause separate white and Negro residential areas, which in turn tend to cause white children and Negro children to go to school in these separate areas.

It is obvious and natural that children tend to go to school in the vicinities of their homes. There has been no judicial determination, however, that local zoning ordinances, urban renewal programs, and the like, have been operated or applied unlawfully or in any racially invalid manner in Charlotte-Mecklenburg.

As to the old law requiring racial separation in the schools, which was voided in 1954, there can obviously be no argument about the invalidity of its application and operation. But whether separate white and Negro residential areas would have developed in Charlotte-Mecklenburg just as truly in the absence of

that wrongful school law, is indeed a matter of conjecture.

In most of the cities of the states that never had such laws, it is an undeniable fact that separate residential patterns have nevertheless occurred and do exist — just as in Charlotte-Mecklenburg. In seeking to develop in this area ground for their rulings, the District Court and the Court of Appeals are obviously traveling largely in the realm of speculation.

More to the point, however, is this basic consideration. The Fourteenth Amendment does not operate upon wrongful conditions as such, but upon the unequal application of laws. Thus, it does not condemn or forbid racial separateness as such. It condemns and forbids laws or governmental actions which compel racial separateness.

> "Since the decision of this Court in the Civil Rights Cases . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States".
>
> *Shelley vs. Kraemer*, 334 US 1, 13, 68 S Ct 836, 92 L Ed 1161, 1180

So when the Fourteenth Amendment comes upon a situation of racial separateness in public schools, its only inquiry is: — Is there law or governmental action — or governmental subterfuge for that matter —

forcing this racial separateness in these schools? If there is, then the Fourteenth Amendment strikes down the law or the action or the subterfuge. But if there is present neither law nor govermental action nor any governmental pressure, subtly or in any wise being exerted, then the Fourteenth Amendment does not command the elimination of the racial separateness.

Certainly and above all — which is the central point of this brief — the Fourteenth Amendment does not command the elimination of any racial separateness by means of a new governmental compulsion, itself shaped and imposed solely according to race.

If a law drives people into a certain place solely because of their race, the Constitution voids that law and declares those people free to go as they will. But the Constitution does not seize upon them and drive them, solely because of their race, away from where they are, nor to any place. That would be to repeat the same wrong which was originally imposed.

For example, let us picture a situation in which a tribe of Indians, solely because of their race, are forced by State law to live segregated in a certain territory or reservation. Let us assume that after many years, that law is ruled unconstitutional and void, but that the Indians, in truth and in fact, choose to continue living where they are.

Would anyone contend that the Constitution of the United States says to these Indians:

"Solely because of your race and in order to accomplish more racial mixing, you must now leave this place where you wish to continue living. It was unconstitutional that compulsion brought you here, in the first place, solely on account of your race. Therefore, and now, this Constitution places a compulsion upon you to go where you do not wish to go, and again it is solely because of your race that this is required of you".

Would this not be to attribute to the Constitution both self-contradiction and oppression?

Brown vs. Board of Education has no such contradictory meanings. It authorizes no new compulsion upon school children shaped according to race. Instead, it forbids any such.

In *Brown* this Court said it was unconstitutional for a state "to separate" children in the public schools "solely because of their race". *Brown vs. Board of Education*, 347 US 483, 494, 74 S Ct 686, 98 L Ed 873, 880. Therefore the Court forbade the states thus "to separate" the school children. "To separate" is a present active verb. When a state or School Board is no longer in any way separating school children because of race, the mandate of *Brown* is being obeyed.

The United States, in its brief to this Court in the *Brown* case said that under the Constitution, "the decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools". (Brief for the United States,

filed in the United States Supreme Court in the case of *Brown vs. Board of Education,* p. 26).

The decree requested of the Court by the plaintiffs in the *Brown* case was that the school authorities be ordered "to cease using race as a basis for determining admission, assignment or attendance in public schools . . ." (Decree tendered by plaintiffs in United States Supreme Court in the case of *Brown vs. Board of Education*).

Insofar as the plaintiffs have been able to ascertain, nobody claimed anything in *Brown* save that states should be required to cease excluding children from schools and assigning children to schools on the basis of race. Since this is all that was asked or argued, is it not reasonable to say that this is all that *Brown* decided, and that *Brown* is not authority for requirements beyond this?

Synopses of the various briefs for the various plaintiffs in the *Brown* case, as set forth in 99 L Ed 1085-1104, show that the contentions presented were essentially the following:

> "The State of Kansas in affording opportunities for elementary education to its citizens, has no power under the Constitution of the United States to impose racial restrictions and distinctions".
>
> Brief for the plaintiffs in the Kansas case

> "Legally enforced racial segregation in the public schools of South Carolina denies the Negro children

of the State that equality of educational opportunity and benefit required under the equal protection clause of the Fourteenth Amendment".

Brief for the plaintiffs in the South Carolina case

"Normal exercise of the judicial function calls for a declaration that the state is without power to enforce distinction based upon race or color in affording educational opportunities in the public schools. The Fourteenth Amendment prohibits a state from making racial distinction in the exercise of governmental power.

• • •

"The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color".

Brief for the plaintiffs in the Virginia case

"This Court . . . should decree that respondents, lacking the constitutional power to assign pupils to public schools on the basis of race, immediately cease and desist using race as a factor in making such assignments".

Brief for the plaintiffs in the District of Columbia case

"Segregation or classification of respondents on the basis of color by the state for determining the

schools they shall attend violates the equal protection clause of the Fourteenth Amendment".

Brief for plaintiffs in the Delaware case

"This court should . . . enjoin the school authorities from considering race in administering school programs . . ."

Brief for amicus curiae

These are the considerations which led to the decision in *Brown*. The plaintiffs agree with them. The orders issued below, however, repudiate them, each and every one.

When the District Court required that children be compulsorily moved here and there, according to race and color, in the Charlotte-Mecklenburg school system, the Court had turned diametrically away from *Brown* and was prescribing a direct violation of *Brown's* ruling and mandate.

Is it not strange indeed that a Court would say to a Negro child, for example! "Because your parents, by reason of their color, were forced to attend this school where you now attend, therefore this Court will now force you, against your will, to go to another school"; and to a white child: "Because, in the past when your parents attended this school where you now attend, Negro children were not allowed to come here, there-

fore this Court will now force you, against your will, to leave this school and go to another school".

Is this not a strange series of non sequiturs? Above all, is it not a strange grant of freedom? As a cure for racial compulsion, says the Court, let us impose more racial compulsion.

Indeed, declares the Court, let the racial compulsion this time be permanent and perpetual. For, as will be recalled, the decree is that in Charlotte-Mecklenburg the school authorities shall "maintain a continuing control over the race of children in each school". Thus, it is decreed that where children are to attend school in this system shall always be determined by the color of their skin and the race into which they were born, and that racial ratios shall be locked upon all succeeding generations of children in these schools, forever (823a).

As some of the Judges of the United States Court of Appeals for the Fifth Circuit have discerningly put it:

> "The freedom of the Negro child to attend any public school without regard to his race or color, first secured in the *Brown* cases, is again lost to him after a short life of less than thirteen years".
>
> *United States vs. Jefferson County Board of Education*, 380 F. 2d 385, 419 (5th Cir., 1967)
> Coleman, Circuit Judge, (concurring)

"[W]hile professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike".

United States vs. Jefferson County Board of Education, 380 F. 2d 385. 405 (5th Cir., 1967)
Gewin and Bell; Circuit Judges, (dissenting)

What then is the true solution?

It is that which is required by the Fourteenth Amendment—and by the *Brown* decision—and, indeed, by all the rulings of this Court against governmental action based on race—and by the Court injunction, which was granted to the plaintiffs, but which has now been wrongfully stricken down—namely:—that no child shall be denied access to any public school because of his race or color and no child shall be assigned to any public school because of his race or color.

All of the zeal and interest and concern that surrounds this matter should be brought to bear to see to it that this freedom is truly and genuinely and in absolute good faith accorded to every child—and that there is no governmental action or practice or subterfuge to the contrary.

Let there be impartial and vigorous enforcement of this freedom from every side and in every quarter. Let governmental compulsion be rooted out of the field—

whether its thrust is in the direction of racial separation or in the direction of racial mixing[1]. Governmental force based upon racial considerations is the evil and the wrong in either case, and it is this that the Constitution forbids.

> "It is unthinkable that our Constitution does not contemplate a middle ground—no compulsion one way or the other."
>
> *United States vs. Jefferson County Board of Education*, 380 F. 2d 385, 414 (5th Cir., 1967)
> Bell and Gewin, Circuit Judges, (dissenting)

> "The true answer remains, give [the child] absolute freedom of choice and see to it that he gets that choice in absolute good faith."
>
> *United States vs. Jefferson County Board of Education*, 380 F. 2d 385, 420 (5th Cir., 1967)
> Coleman, Circuit Judge, (concurring)

This is fair and moral and right. It is logical and consistent and understandable. It is what the Constitution and the applicable decisions of this Court require. Above all, it is individual freedom. It is the key

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[1]If it be objected that in this, Courts might have to determine motives, intents and purposes, so be it. Courts are, of course, constantly in the business of probing such areas.

to the problem. For this great controversy—to paraphrase the expressive words of Saint Augustine—"will find no rest 'til it rest in"—freedom.

II. Some Practical Considerations Which Are Here Pertinent

The plaintiffs realize that if the law clearly and beyond doubt requires certain court orders, then no considerations of their practicality or advisability can deter a court from issuing them, or an appellate court from sustaining them.

Even their most ardent supporters do not claim, however, that the validity of the orders issued below is beyond doubt. It would seem, therefore, both appropriate and needful that some thought be given to the wisdom and the practicality of the course upon which the lower courts are embarked.

In the first place, in dealing with such orders as have been issued by the District Court below, there can never be an end of confusion and puzzlement—either on the part of those who are subjected to these orders, or the officials who administer them, or the judges who promulgate them. This is true because there underlies such orders an inherent and pervasive inconsistency. And it rises again and again to confront and discomfit whoever seeks to justify such orders, or to understand them or to deal with them. However this deep inconsistency be patched over, it inevitably re-

appears in some equally disconcerting and reprehensible posture.

Thus, it is not long possible to put forward convincingly:

A compulsion as a grant of freedom,

or

A contention that the same words in the Fourteenth Amendment forbid compulsion on the basis of race and also require compulsion on the basis of race,

or

A pronouncement that it is necessary to operate schools on a racial basis in order to implement the command of *Brown* that they be operated on a nonracial basis,

or

A proposition that the cure for racial compulsion in the past is to impose racial compulsion in the present,

or

A decree that since *Brown* outlawed any consideration of race in the assignment of children to schools, therefore school authorities must maintain a continuing control over the race of children in each school, forever.

From every direction, such dilemmas arise, and will endlessly arise, if orders such as have been issued below are maintained.

Further, with respect to consistency, can it ever be satisfactorily explained to the children in a school, and their parents, why their school is selected for purposes of long-distance reassignment of its pupils, and other schools are not?

There are many cities and communities in this Nation where it is not possible to mix the races in public schools, no matter what court orders are issued, for the simple reason that it is not physically and geographically possible to bring the races together in those cities and localities. Is it to be thought that people will ever forget or cease to resent the fact that while mixing for purely racial reasons is forced on them in the name of the Constitution, millions of other people under the same Constitution are not similarly forced, because court orders against them would in any event be unenforceable?

There is another consideration which, it would seem, ought to be taken into account. It has become apparent that these school cases, like Dickens' "Jarndyce vs. Jarndyce," once in a court, seem never to get out of court. This is essentially because the Judges in these cases inevitably get into the business of running the public schools.

The District Court below in its directive for the maintaining of "continuing control over the race of children in each school," has certainly assured itself, and higher Courts as well, a "continuing" task of surveillance and judgment over the Charlotte-Mecklen-

burg school system. Just as truly, the Court of Appeals opened an equally limitless prospect of continuing litigation with its announcement of a test of "reasonableness" to be applied to the constitutional rights here involved.

The consideration most vigorously advanced by those who urge the forced mixing of races in the public schools is that it will assuredly lift the quality of education for everybody. The pros and cons of that broad subject are most certainly beyond the proper scope of this brief. But is it not common sense to question, in passing, whether forcing children, on purely racial grounds into schools—particularly distant schools—which they do not wish to attend, and which their parents do not wish them to attend, is likely to increase their motivation to apply themselves in such schools—or likely to have good effect upon their relations with their fellow students there—or likely in any way to improve the morale, discipline or standards of excellence in those schools?

It ought not to be overlooked that in dealing with schools, even though public, Courts are moving in an area which people regard as a vital and sensitive part of their personal and private and family lives. In this area, a large measure of freedom of individual decision and action is deeply cherished and jealously guarded.

If such freedom is too far invaded by governmental compulsions, people will inevitably find ways to re-

gain it—and this, to be sure, they can still do in this land without resort to means that are disobedient or defiant of law. An obvious example of this is the fact, of common knowledge, that as a direct result of the same sort of compulsion here in question, tens of thousands of children in many states are now moving out of public schools altogether and into private schools.

In this connection, should it not give some pause to note that no legislative body—no elected representatives of the people—anywhere in this Nation have ever enacted any statute, or expressed themselves, in any way as, favoring or authorizing or permitting the compulsion which has been ordered below, namely, the mandatory assignment of children to public schools according to race. On the other hand, various States have enacted statutes to the contrary, and the Congress of the United States has twice expressed itself very specifically and positively to the contrary. Civil Rights Act of 1964, 42 U.S.C. 2000c(b) and 2000c-6(a).

After all, it smacks of alien regimes and ancient oppressions to be driving and herding people here and there according to groups and colors and races. It is hard to accept the idea that the Constitution of the United States commands this—or would indeed tolerate any of it.

It may be thought that the ruling and the directive sought by the plaintiffs is too elementary and too simplistic to be put forth by this Court in a field of contest

as confused and complex as this. But does not the formidable tangle result in large measure from the fact that so many who deal with it have failed to discern where the fundamentals lie?

The plaintiffs had an injunction which directed the defendant School Board not to deny children access to the Charlotte-Mecklenburg public schools on the basis of race or color and not to assign children to the Charlotte-Mecklenburg public schools on the basis of race or color. That injunction, the plaintiffs contend, was in keeping with North Carolina statute, with *Brown vs. Board of Education*, and with the Constitution of the United States. It was taken away from the plaintiffs by the Courts below on the ground that, instead, it conflicted with *Brown* and the Constitution.

That injunction was indeed brief, and simple in its terms. So is the Fourteenth Amendment to the Constitution. So also is the principle laid down in *Brown*. The plaintiffs ask that their injunction, in the strength and simplicity of its elementary terms, be restored to them. Those terms—enforced impartially, literally and without intricate inversions—will give the plaintiffs the protection to which they are constitutionally entitled.

On the other hand, such orders as have been issued in the Courts below if allowed to stand, will be not only instruments of oppression upon the plaintiffs, and all others who are similarly situated across this land. They will also inevitably be the well-springs of

confusion forever compounded and of controversy without end.

There is only one road out of this great morass. There is only one true answer to the riddles that are now multiplying. That answer is:—Not compulsion based on race—but freedom without regard to race.

CONCLUSION

Upon all of the foregoing, the plaintiffs earnestly pray this Court for a decree that the provisions of State statute and of State Court injunction which are here in issue are constitutional and valid and are entitled to enforcement, and that the orders to the contrary in the Courts below are invalid and constitute erroneous interpretation and application of the United States Constitution.

Respectfully submitted,

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